Garry E. Hunter
Director of Law
City of Athens, Ohio
Law Administration Bldg.,
Suite 301
8 East Washington Street
Athens, Ohio 45701
(740) 592-3332

Counsel for Amicus Curiae
The City of Athens, Ohio

Barry M. Byron
Counsel of Record for the
Ohio Municipal League
John E. Gotherman
Interstate Sq. Building I
Suite 240
4230 State Route 306
Willoughby, Ohio 44094
(440) 951-2303

Counsel for Amicus Curiae
The Ohio Municipal League

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In the
Supreme Court of the United States

CITY OF FAIRFIELD, OHIO, ET AL.,
Petitioners,

v.

LYNN D. TUCKER, JR., ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER, CITY OF FAIRFIELD, OHIO

HENRY W. UNDERHILL, JR.*
LANI L. WILLIAMS
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
1110 VERMONT AVENUE, NW
SUITE 200
WASHINGTON, DC 20005
(202) 466-5424

* COUNSEL OF RECORD

Becker Gallagher Legal Publishing, Inc., 800.890.5001

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

Pursuant to this Court's Rule 37.3(b), the *amicus curiae*, International Municipal Lawyers Association ("IMLA"), respectfully requests this Court's leave to file the attached brief in support of the Petitioners. In support of its motion, IMLA states as follows:

1. IMLA requested the consent of the parties to file this brief. Written consent to file this brief was obtained from the Petitioners. The Respondents refused to consent to the filing of this brief.

2. IMLA represents the interests of local governments through out the United States on both legal and policy

issues. IMLA seeks to strengthen and promote local government interests and views on a broad range of issues before the courts and federal elected officials.

3. Local governments routinely face issues of how to regulate the property they hold in trust for the public. These issues include the use of property for protest and demonstration and the use of public property to display non-public signs and structures. As such, local governments' collective interest in this case, as represented by IMLA is great. In addition, principles in this case deal not only with the regulation of public property, but with the application of legal principles generally. The application of the "narrowly tailored" requirement is found in cases involving government property, sign regulation, and business regulation. The "narrowly tailored" requirement affects many local governments on a day to day basis through the application of regulations to government property. The outcome of this case will affect local governments' throughout the United States.

4. This brief presents legal arguments and information supplemental to the Petitioner's brief which will assist the Court in reviewing this matter.

Respectfully submitted,

Henry W. Underhill, Jr.*
Lani L. Williams
International Municipal Lawyers Association
1110 Vermont Avenue, NW
Suite 200
Washington, DC 20005
(202) 466-5424

* Counsel of Record

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INTEREST OF THE *AMICI CURIAE*[1]

The International Municipal Lawyers Association is a nonprofit, nonpartisan professional organization consisting of more than 1,400 member entities. Its membership is comprised of local governments, including cities and counties, and subdivisions thereof as represented by their chief legal officers; state municipal leagues; and individual attorneys who represent municipalities, counties, and other local government entities.

IMLA, previously known as the National Institute of Municipal Law Officers, has provided services and educational programs to local governments and their attorneys since 1935. IMLA's Legal Advocacy Program serves municipalities by advocating the nationwide interests, positions, and views of local governments on legal issues. IMLA has appeared as friend of the court on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

As of 2002, over 87,000 local government units existed in the United States. This number includes 3,034 county governments, 19,431 municipal governments, and 16,506 town and township governments, many of which regulate the placement of signs, structures and other items in their rights of way . *See* U.S. Bureau of Census, Federal State and Local

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

Governments, 2002 Census of Governments, *Preliminary Report No. 1*, July 2002 *available at* <http://ftp2.census.gov/govs/cog/2002COGprelim_report.pdf >. As a representative association of these local governments, IMLA has a strong interest in this case. The proper application of the "narrowly tailored" analysis in cases reviewing content neutral time, place, and manner regulations is of vital importance to all local governments.

Hence, the *amicus curiae's* interest in this case.

STATEMENT

This case is an "as applied" challenge to a Fairfield, Ohio ordinance governing the placement of structures on the public rights of way in Fairfield. This case arises out of incidents taking place on Dixie Highway in Fairfield, Ohio, a city with a population of just over 40,000 people. On three occasions, the Respondents set up a rat balloon in the right of way along side Dixie Highway to use as part of their demonstration. On each occasion, they were warned that inflating the balloon and attaching it to the ground violated Fairfield's ordinance against structures in the public right of way. It was not until the third instance of erecting the balloon that the Respondent was ticketed.

Dixie Highway is like many highways throughout the United States. However, it is important to visualize the physical area where the dispute is centered because the public right of way is not equivalent to the parks and streets that have often figured so prominently in this Court's First Amendment cases. *See*, *Davis v. Massachusetts*, 167 U.S. 43 (1897), *Cox v. New Hampshire*, 312 U.S. 569 (1941), *Niemotko v. Maryland*, 340 U.S. 268, 279 (1951), *Members of the City Council of Los Angeles v. Taxpayers for Vincent*,

466 U.S. 789 (1984), *Frisby v. Schulz*, 487 U.S. 474, 485-86 (1988). Dixie Highway connects several communities in Ohio and is lined with a variety of small retail establishments, strip malls, car dealerships, and "fast food" restaurants, especially where it enters populated areas like Fairfield. It is a four lane highway, sometimes with a center turn lane, and speed limits are generally set at 55 miles per hour, though as the highway travels through towns and cities along its route, its limit fluctuates. In 1998, estimates of vehicular traffic concluded some 40,000 cars per day traveled on Dixie Highway – a significant number of trips. *See*, Amy Higgins, *Ohio 4 Study: How Much is Too Much*, The Cincinnati Inquirer, Nov. 12, 1998 available at <http://www/enquirer.com/editions/1998/11/12/route4study.html>.

The particular portion of Dixie Highway at issue in this case has approximately a thirty foot grass embankment separating the four lane highway from Fairfield Ford, the business the Respondents were picketing. There is no sidewalk on this portion of Dixie Highway.

While the parties have litigated this case with the assumption that the public right of way is a public forum, IMLA notes case law suggests the right of way may be a nonpublic forum. See, *Jacobsen v. Illinois Department Of Transportation*, No. 04-1115, 2005 WL 1962784, (7th Cir. August 17, 2005) (rest areas attached to the Nations' Interstate highway system are nonpublic as Interstate system was primarily designed for safe and expeditious travel, not for the free exchange of ideas); *Jacobsen v. Bonine*, 123 F.3d 1272 (9th Cir. 1997) (same); *Sentinel Communications Company v. Watts*, 936 F.2d 1189 (11th Cir. 1991) (same); *Jacobsen v. Howard*, 109 F.3d 1268 (8th Cir. 1997) (assuming without deciding that interstate rest areas are nonpublic fora); *Brown v. California Department Of*

Transportation, 321 F.3d 1217 (9th Cir. 2003) (highway overpass fence not a public forum); *State Of Texas v. Knights Of The Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995) ("The Texas highways exist for the purpose of facilitating movement around the state. The State does not act unreasonably when it prohibits speech which would interfere with that function."); *but cf.*, *Faustin v. City And County Of Denver, Colorado*, 268 F.3d 942 (10th Cir. 2001) (sidewalk on highway overpass linking sidewalk on parallel streets constituted a public forum). In fact, the characterization of a place as physically a street, sidewalk, or park, without more, is not adequate to define a traditional public forum. *See United States v. Kokinda*, 497 U.S. 720, 727, (1990) (plurality opinion) ("The mere physical characteristics of the property cannot dictate forum analysis"). *See also*, *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (only streets, sidewalks, and parks have been identified as traditional public fora and then only when the street, sidewalk, or park has been dedicated to the "free exchange of ideas."); *United States v. Kokinda*, 497 U.S. 720, 728-729 (1990) (sidewalk to postal facility entrance not a public forum, "the location and purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum").

If the public right of way were not considered a public forum, the regulation at issue would only need to meet rational basis review – the regulation must be viewpoint neutral and reasonable in light of the purpose of the forum and the surrounding circumstances. *Cornelius*, 473 U.S. at 800 (1985).

ARGUMENT

The *amici* urge this Court to accept *certiorari* in this case for two reasons. First, the issue is one of great importance to local governments through out the United States and involves an important question of federal law needing guidance from this Court. Second, the Sixth Circuit's decision is contrary to this Court's precedent.

I. THE "NARROWLY TAILORED" STANDARD NEEDS REFINEMENT FROM THIS COURT

In First Amendment jurisprudence, content neutral time, place, and manner regulations survive constitutional scrutiny if they are 1) narrowly tailored; 2) serve a significant or substantial government interest; and 3) leave open ample alternate channels of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), *see Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). However, courts have little guidance on how to determine whether a regulation is "narrowly tailored."

In discussing *Hill v. Colorado*, 530 U.S. 703 (2000), a commentator states that this Court's analysis was complicated because of earlier cases which applied the "narrowly tailored" doctrine inconsistently. *The Supreme Court 1999 - Term Leading Cases*, 114 Harv. L. Rev. 289, 295 (Nov. 2000). Noting that content neutral time, place and manner restrictions need not be so narrowly tailored as to meet strict scrutiny, the author states "the precise contours of this less rigorous standard remain undefined." *Id.* The author notes that in some instances "narrow tailoring" has been considered a form of intermediate scrutiny by this Court and lower courts. *Id.* at n.53 (collecting references).